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10/725,248

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Sharon Ann Norton

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10/05/2007

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EXAMINER

CLARK, AMY LYNN

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/725,248
Filing Date: December 01, 2003
Appellant(s): NORTON ET AL.

Kristin Kohler
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed April 3, 2007 appealing from the Office action mailed June 27, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

For the above reasons, it is believed that the rejections should be sustained.

Claims 1-53 are pending.

Claims 13 and 24-53 are withdrawn.

Claims 1-12 and 14-23 are appealed.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

Appellants' statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows: The rejection of claims 1-12 and 14-23 under 35 USC § 112, second paragraph has been withdrawn. The rejection of claims 1, 2, 6-9, 14, 15 and 18-21 under 35 U.S.C. 102(b) as being anticipated by Farang et al., as evidenced by <http://en.wikipedia.org/wiki/Food>, http://web.archive.org/web/*/http://www.peteducation.com/article.cfm?cls=1&cat=1399&

articleid=2705 and http://dictionary.reference.com/search?q=companion&r=66 has been withdrawn.

NEW GROUNDS OF REJECTION

The rejection of claims 1, 2, 6-9, 14, 15 and 18-21 under 35 U.S.C. 102(b) as being anticipated by Farang et al., as evidenced by http://en.wikipedia.org/wiki/Food, http://web.archive.org/web/*/http://www.peteducation.com/article.cfm?cls=1&cat=1399&articleid=2705 and http://dictionary.reference.com/search?q=companion&r=66 has been withdrawn, however, upon further consideration, a new grounds of rejection is made with regards to the rejection of claims 1, 2, 6-9, 14, 15 and 18-21 under 35 U.S.C. 103(a) as being unpatentable over Farang et al., in view of http://en.wikipedia.org/wiki/Food, http://web.archive.org/web/*/http://www.peteducation.com/article.cfm?cls=1&cat=1399&articleid=2705 and http://dictionary.reference.com/search?q=companion&r=66.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

| | | |
|---------------------------|----------------------|----------------|
| US 4,241,093 | FARANG et al. | 12-1980 |
| US 2002/0054923 A1 | SUZUKI et al. | 5-2001 |
| US 2003/0099759 A1 | CHEUK et al. | 5-2003 |

http://en.wikipedia.org/wiki/Food

http://web.archive.org/web/*/http://www.peteducation.com/article.cfm?cls=1&cat=1399&articleid=2705

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<http://dictionary.reference.com/search?q=companion&r=66>

<http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=186168>

9414

(9) Grounds of Rejection

The following **grounds** of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-5 and 14-17 remain rejected under 35 U.S.C. 102(a) as being anticipated over Suzuki et al., as evidenced by

<http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=186168>

9414.

This rejection is maintained for reasons of record set forth in the paper mailed on June 27, 2006 and repeated below, slightly altered to take into consideration Appellant's arguments filed on April 03, 2007.

Appellant claims a composition comprising at least about 0.25% of total fermentable fiber, consisting of beet pulp, by weight of the composition, wherein the composition is a liquid, which is adapted for use by a companion animal. Appellant further claims a composition comprising at least about 0.5% of total fermentable fiber, by weight of the composition. Appellant further claims the composition comprising one or more nutrients. Appellant further claims the composition comprising from about 0.1%-20% of total fermentable fiber.

Suzuki teaches an agent for preventing, inhibiting or treating hypertension, comprising two distinct components, which by definition is a composition (See abstract). Suzuki further teaches these components are a compound selected from the group consisting of caffeic acid, chlorogenic acid and ferulic acid, and esters and pharmaceutically acceptable salts thereof and a component selected from the group consisting of central nervous system stimulating components, food fibers, extracts of perennial evergreen leaves, etc (See abstract). Suzuki further teaches that the food fibers in the composition include beet fibers obtained from beet pulp (See paragraph 0026) in a proportion of 0.001 to 1% (See paragraph 0025). Suzuki further teaches that when food fiber is used, the composition is in the form of a drink or a food (See paragraph 0029) and that when the food fiber is used, it is contained in a proportion of 0.1-20% (See paragraph 0030). Suzuki further teaches the drink comprising of the composition contains 82.1-83.6% water (paragraph 0085 and "Table 11"), which is suitable for drinking (please note that drinking water is defined as water intended for people to drink, as taught by <http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=1861689414>), since Suzuki further teaches that the drink containing the composition and 82.1-83.6% water were given to humans (See paragraph 0087).

Therefore, the reference anticipates the claimed subject matter.

Claims 1, 2, 4-12, 14, 15 and 18-23 remain rejected under 35 U.S.C. 102(a) as being anticipated over Cheuk et al.

This rejection is maintained for reasons of record set forth in the paper mailed on June 27, 2006 and repeated below, slightly altered to take into consideration Appellant's arguments filed on April 03, 2007.

Appellants claim a composition comprising at least about 0.25% of total fermentable fiber, consisting of beet pulp, by weight of the composition, wherein the composition is a liquid, which is further claimed as gravy, which is adapted for use by a companion animal. Appellants further claim a composition comprising at least about 0.5% of total fermentable fiber, by weight of the composition. Appellants further claim the composition further comprising at least about 0.5% protein and at least about 1% fat, by weight of the composition. Appellants further claim the composition comprising one or more nutrients. Appellants further claim a composition comprising from about 0.1% to about 20% of total fermentable fiber.

Cheuk teaches a canine pet food composition comprising meat, which Cheuk teaches contains 15-25% protein (See paragraph 0037) and 5-15% fat (See paragraph 0037), beet pulp (which inherently contains insoluble fiber), in an amount of about 8 wt%-16 wt% (See paragraph 0047), and vitamins and minerals (See paragraph 0040) in the form of a chunk and gravy composition (See paragraph 0051 and Claim 4). Cheuk further teaches a method of making a canine pet food composition comprising a first step, wherein the meat components are "thermally set" at and/or below temperatures of protein denaturation of the mixture and heated essentially by themselves, that is, with the essential or total absence of grains, additional water, vitamins, minerals, and the like and that the heating process generally improves the texture of the meats by inactivating

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the bacterial and tissue enzyme processes, it is believed, thereby providing a final pet food composition which is friable, that is, breaks under stress and that the temperature treatment is such that a slight coagulation of the protein occurs which contributes to the moisturized appearance of the protein in the final product (See paragraph 0022).

Cheuk further teaches that the next step involves treating grains, which may be beet pulp (See paragraph 0040), separately and then adding them to the previously "thermally set" meat, wherein the grains are mixed and cooked at a temperature range which will achieve or essentially achieve hydration, gelatinization, and retrogradation so as to improve their binding to the meats and/or reduce the stickiness or increase the firmness of the finished product texture and additionally, complex carbohydrate is broken down to simpler carbohydrate. Cheuk further teaches that an elevated temperature is needed to accomplish these properties, wherein this step is carried out at a temperature of up to 180-200 °F but desirably not exceeding 180-185 °F can be employed (See paragraph 0023). Cheuk further teaches that various gravy components, wherein the gravy that ensues (please note that gravy is a thickened sauce, which may be gelatinous) with meat that has been heated to a temperature at or below the denaturation point of the meat portion (please note that gravy can be further defined to include juices and extractives of meat during cooking to form a thickened sauce) are made by heating such as native starches, water and the like to prepare a viscosity building slurry or fluid and that the purpose of such preparation is to increase the cohesiveness of the two components (a) and (b) so as to maintain an essentially or totally homogenous mass during the filling process into the container (See paragraph

0024 and Claim 4). Cheuk further teaches that the components are heated with water to about 180-200 °F to provide a viscosity buildup slurry or fluid so as to maintain an essentially or totally homogeneous mass during the filling process while post retorting (after filling) these material(s) will retrograde to deliver the desired characteristics such as friable texture in the final packaged canine diet when opened for consumption (See paragraph 0029).

Cheuk does not expressly teach a composition comprising from about 0.1% to about 20% of total fermentable fiber, however Cheuk teaches an amount of fermentable fiber which falls within the range claimed by Appellant, therefore, Cheuk anticipates the claimed subject matter.

Therefore, the reference anticipates the claimed subject matter.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1, 2, 6-9, 14, 15 and 18-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Farang et al., in view of <http://en.wikipedia.org/wiki/Food>, http://web.archive.org/web/*/http://www.peteducation.com/article.cfm?cls=1&cat=1399&articleid=2705 and <http://dictionary.reference.com/search?q=companion&r=66>.

Appellants claim a composition comprising at least about 0.25% of total fermentable fiber, consisting of beet pulp, by weight of the composition, wherein the composition is a liquid, which is further claimed as a gravy, which is adapted for use by

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a companion animal. Appellants further claim a composition comprising at least about 0.5% of total fermentable fiber, by weight of the composition. Appellants further claim the composition comprising one or more nutrients.

Farang teaches a stable, bland, free flowing food supplement (please note that food is defined as any substance that can be consumed, including liquid drinks and that food is the main source of energy and of nutrition for animals, as taught by <http://en.wikipedia.org/wiki/Food>) comprising sugar beet pulp, which has a chemical composition of about 4-8% by weight water, 7-9% crude protein, which reads on a nutrient, about 15-25% crude fiber (please note that the fiber in beet pulp is insoluble and moderately fermentable, as taught by http://web.archive.org/web/*/http://www.peteducation.com/article.cfm?cls=1&cat=1399&articleid=2705, on page 1, paragraph 3, found in the section entitled "The benefits of beet pulp"), which anticipates the range, about 60-70% nitrogen-free extracts and about 2.5-5% ash (See column 4, claim 9). Farang further teaches that the food supplement is usable in gravies, soups, sauces, dips and batters as well as in imitation fruit drinks (See column 1, lines 54-62 and column 3, lines 38-49). Farang further teaches a composition comprising at least 0.25% fermentable fiber. Please note that human beings are "companion animals", since humans are defined to be mammals, which is synonymous with animal and companion is defined as "a person who accompanies or associates with another" (See <http://dictionary.reference.com/search?q=companion&r=66>).

Farang does not teach that the composition is in the form of a liquid. However, at the time the invention was made, it would have been obvious to one of ordinary skill in the art and one would have been motivated and had a reasonable expectation of success to modify the form of the composition taught by Farang to provide the instantly claimed invention because at the time the invention was made, it was known in the art that the composition taught by Farang could be used in gravies, soups, sauces, dips and batters as well as in imitation fruit drinks (please note that gravies, soups, sauces, dips, batters and drinks are all liquid compositions), as clearly taught by Farang.

Based upon the beneficial teachings of the cited references, the skill of one of ordinary skill in the art, and absent evidence to the contrary, there would have been a reasonable expectation of success to result in the claimed invention.

Accordingly, the claimed invention was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, especially in the absence of evidence to the contrary.

(10) Response to Argument

Claim Rejections - 35 USC § 102

Claims 1-5 and 14-17 remain rejected under 35 U.S.C. 102(a) as being anticipated over Suzuki et al., as evidenced by

<http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=1861689414>.

Appellants' arguments have been thoroughly considered, but the rejection remains the same for the reasons set forth in the previous Office action and for the reasons set forth below.

Appellants argue that in response to Appellants' previous arguments, that Suzuki does not disclose a composition for use in a companion animal, the Examiner replies with the analysis that Appellants' use of the phrase "and the like" in defining "companion animal" extends the definition to include humans, and therefore, Appellants' composition for companion animals is merely an intended use, does not create a structural difference between the claimed composition and the cited composition, and thus is not limiting. Appellants further argue that under § 102, anticipation requires that all the Claim elements appear in a prior art document. "A Claim is anticipated only if each and every element set forth in the claim is found, either expressly or inherently described, in a single prior art reference." MPEP § 2131 citing *Verdegal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2D 1051, 1053 (Fed. Cir. 1987). "The identical invention must be shown in as complete detail as is contained in the ... Claim." MPEP § 2131 citing *Richardson v. Suzuki Motor Co.*, 868 P.2d 1226, 1236, 9 USPQ2D 1913, 1920 (Fed. Cir. 1989).

In response to appellants' arguments set forth above, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

Appellants are further directed to MPEP § 2106 (C), which states:

"The subject matter of a properly construed claim is defined by the terms that limit its scope. It is this subject matter that must be examined. As a general matter, the grammar and intended meaning of terms used in a claim will dictate whether the language limits the claim scope. Language that suggests or makes optional but does not require steps to be performed or does not limit a claim to a particular structure does not limit the scope of a claim or claim limitation. The following are examples of language that may raise a question as to the limiting effect of the language in a claim:

- (A) statements of intended use or field of use,
- (B) "adapted to" or "adapted for" clauses,
- (C) "wherein" clauses, or
- (D) "whereby" clauses.

This list of examples is not intended to be exhaustive. See also MPEP § 2111.04."

Therefore, the intended use of the claimed composition does not patentably distinguish the composition, *per se*, since such undisclosed use is inherent in the reference composition. In order to be limiting, the intended use must create a structural difference between the claimed composition and the prior art composition. In the instant case, the intended use does not create a structural difference, thus the intended use is not limiting.

"[T]he discovery of a previously unappreciated property of a prior art composition, or of a scientific explanation for the prior art's functioning, does not render the old composition patentably new to the discoverer." *Atlas Powder Co. v. Ireco Inc.*, 190 F.3d 1342, 1347, 51 USPQ2d 1943, 1947 (Fed. Cir. 1999). Thus the claiming of a new use,

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new function or unknown property which is inherently present in the prior art does not necessarily make the claim patentable. In re Best, 562 F.2d 1252, 1254, 195 USPQ 430, 433 (CCPA 1977).

Appellants further argue that the present invention requires in Claim 1 a composition comprising at least about 0.25% of total fermentable fiber, by weight of the composition, wherein the composition is a liquid which is adapted for use by a companion animal and that Suzuki does not teach or suggest that the composition disclosed therein could even possibly be adapted for use by a companion animal. Appellants further argue that although the Examiner attempts to include humans in the definition of companion animal provided in the present specification, humans are not included in the Appellants' definition of companion animal as presented in the specification.

Please note that Appellants define "companion animal" as domestic animal and Appellant provides a few examples of possible "companion animals", such as domestic dog, cat, rabbit, ferret, horse, cow, or the like in the originally filed specification. Please note that Appellant leaves the definition open by further disclosing "or the like". First of all, humans do fall under the category of "companion animal" for the reasons set forth above, secondly, humans fall under the category of "domestic animal" since the biological definition of "animal" refers to all members of the Kingdom Animalia and, therefore, when the word "animal" is used in a biological context, humans are included. Humans are also considered to be "domestic", which by definition means of or pertaining to the home, the household or the family, devoted to home life, of or

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pertaining to one's own or particular country as apart from other countries or indigenous to a country.

Therefore, the reference anticipates the claimed subject matter.

Claims 1, 2, 4-12, 14, 15 and 18-23 remain rejected under 35 U.S.C. 102(a) as being anticipated over Cheuk et al.

Appellants' arguments have been thoroughly considered, but the rejection remains the same for the reasons set forth in the previous Office action and for the reasons set forth below.

Appellants argue that Cheuk specifically discloses a "...meat based material having an essentially *solid* mass assuming the shape of the container in which it is packed,..." and that the composition has "... visually recognizable discrete meat particles with a moisturized appearance upon slicing the pet food mass after departure from the said container." See Column 1, paragraph [0003]. Appellants further argue that, therefore, Cheuk clearly does not teach a liquid composition, the composition of Cheuk that contains the grains cited by the Examiner is a solid composition and Cheuk does not teach, suggest or disclose a liquid composition containing fiber.

In response to Appellants' argument, it should be noted that Appellants are claiming a composition comprising at least about 0.25% of total fermentable fiber, consisting of beet pulp, by weight of the composition, wherein the composition is a liquid which is adapted for use by a companion animal. Please note that the claim explicitly states that the liquid of the composition may be adapted (please note that adapted

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means "changed in order to improve or made more fit for a particular purpose" and "to make suitable to or fit for a specific use or situation") for use by a companion animal. Given the broadest reasonable interpretation of "adapted for use by a companion animal, Cheuk does in fact teach Appellants' claimed invention, since Cheuk teaches a canine pet food composition that is originally in liquid form that solidifies when cooled to provide a pet food composition in a form that is more easily and readily useable by a companion animal. Therefore, the composition taught by Cheuk is a liquid "adapted for use by a companion animal" and the reference anticipates the claimed subject matter.

Claim Rejections - 35 USC § 103

Claims 1, 2, 6-9, 14, 15 and 18-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Farang et al., in view of <http://en.wikipedia.org/wiki/Food>, http://web.archive.org/web/*/http://www.peteducation.com/article.cfm?cls=1&cat=1399&articleid=2705 and <http://dictionary.reference.com/search?q=companion&r=66>.

Although the Examiner agrees with Appellants' argument that under § 102, anticipation requires that all the Claim elements appear in a prior art document. "A Claim is anticipated only if each and every element set forth in the Claim is found, either expressly or inherently described, in a single prior art reference." MPEP § 2131 citing *Verdegal Bros. v. Union Oil Co. of California*, 814 F.2d 628,631, 2 USPQ2D 1051, 1053 (Fed. Cir. 1987). "The identical invention must be shown in as complete detail as is contained in the ... Claim." MPUP § 2131 citing *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2D 1913, 1920 (Fed. Cir. 1989), and that the present

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invention requires in Claim 1 a composition comprising at least about 0.25% of total fermentable fiber, by weight of the composition, wherein the composition is a liquid which is adapted for use by a companion animal, the Examiner does not find the following arguments to be persuasive.

Appellants argue that Farang never teaches or suggests a liquid composition comprising at least about 0.25% of total fermentable fiber. Appellants further argue that Farang specifically teaches that the composition is dry and quickly swells in hot or cold aqueous systems, thereby creating a filling and thickening material. See Column 1, lines 54-62.

In response to Appellants' arguments, please note that Farang teaches a food supplement that may be used in gravies, soups, sauces, dips and batters, as well as in imitation fruit drinks. Therefore, although Farang does not expressly teach a composition in liquid form, it would have been obvious to make the food supplement into a liquid composition because the food supplement taught by Farang was known to be used to make liquid compositions, such as in gravies, soups, sauces, dips, batters, and imitation fruit drinks.

Appellants further argue that additionally, Farang does not teach or suggest that the composition is adapted for use by a companion animal. Appellants further argue that although the Examiner attempts to include humans in the definition of companion animal provided in the present specification, humans are not included in the Appellants' definition of companion animal as presented in the specification; therefore, the present invention cannot be anticipated by this reference because Farang et al. does not

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disclose each and every element of the present application, it cannot as a matter of law anticipate the present application.

Please note that Appellants define "companion animal" as domestic animal and Appellant provides a few examples of possible "companion animals", such as domestic dog, cat, rabbit, ferret, horse, cow, or the like. Please note that Appellant leaves the definition open by further disclosing "or the like". First of all, humans do fall under the category of "companion animal" for the reasons set forth above, secondly, humans fall under the category of "domestic animal" since the biological definition of "animal" refers to all members of the Kingdom Animalia and, therefore, when the word "animal" is used in a biological context, humans are included. Humans are also considered to be "domestic", which by definition means of or pertaining to the home, the household or the family, devoted to home life, of or pertaining to one's own or particular country as apart from other countries or indigenous to a country.

Furthermore, it should be noted that Appellants are citing an intended use of a composition. It should be noted that the intended use of the claimed composition does not patentably distinguish the composition, *per se*, since such undisclosed use is inherent in the reference composition. In order to be limiting, the intended use must create a structural difference between the claimed composition and the prior art composition. In the instant case, the intended use does not create a structural difference, thus the intended use is not limiting.

"[T]he discovery of a previously unappreciated property of a prior art composition, or of a scientific explanation for the prior art's functioning, does not render the old

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composition patentably new to the discoverer." *Atlas Powder Co. v. Ireco Inc.*, 190 F.3d 1342, 1347, 51 USPQ2d 1943, 1947 (Fed. Cir. 1999). Thus the claiming of a new use, new function or unknown property which is inherently present in the prior art does not necessarily make the claim patentable. *In re Best*, 562 F.2d 1252, 1254, 195 USPQ 430, 433 (CCPA 1977). See also MPEP § 2112.01 with regard to inherency and product-by-process claims.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

This examiner's answer contains a new ground of rejection set forth in section (9) above. Accordingly, appellant must within **TWO MONTHS** from the date of this answer exercise one of the following two options to avoid *sua sponte* **dismissal of the appeal** as to the claims subject to the new ground of rejection:

(1) **Reopen prosecution.** Request that prosecution be reopened before the primary examiner by filing a reply under 37 CFR 1.111 with or without amendment, affidavit or other evidence. Any amendment, affidavit or other evidence must be relevant to the new grounds of rejection. A request that complies with 37 CFR 41.39(b)(1) will be entered and considered. Any request that prosecution be reopened will be treated as a request to withdraw the appeal.

(2) **Maintain appeal.** Request that the appeal be maintained by filing a reply brief as set forth in 37 CFR 41.41. Such a reply brief must address each new ground of

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rejection as set forth in 37 CFR 41.37(c)(1)(vii) and should be in compliance with the other requirements of 37 CFR 41.37(c). If a reply brief filed pursuant to 37 CFR 41.39(b)(2) is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under 37 CFR 41.39(b)(1).

Extensions of time under 37 CFR 1.136(a) are not applicable to the TWO MONTH time period set forth above. See 37 CFR 1.136(b) for extensions of time to reply for patent applications and 37 CFR 1.550(c) for extensions of time to reply for ex parte reexamination proceedings.


Respectfully submitted,

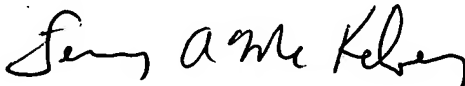
Examiner Amy L. Clark

A Technology Center Director or designee must personally approve the new ground(s) of rejection set forth in section (9) above by signing below:

Conferees:

Supervisory Patent Examiner Terry McKelvey

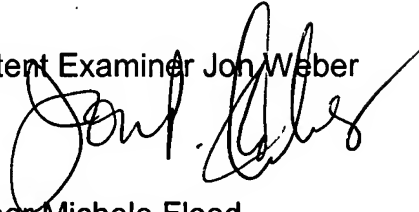

Bruce M. Kissluk, Director
Technology Center 1600



TERRY MCKELVEY, PH.D.
SUPERVISORY PATENT EXAMINER

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Supervisory Patent Examiner Jon Weber

A handwritten signature in black ink, appearing to read "Jon Weber", written over the printed name.

Jon Weber
Supervisory Patent Examiner

Primary Examiner Michele Flood

A handwritten signature in black ink, appearing to read "Michele C. Flood", written over the printed name.

MICHELE FLOOD
PRIMARY EXAMINER